No. 14537

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the use of Westinghouse Electric Supply Company, a corporation and all similarly situated,

Appellant,

vs.

JOHN V. AHEARN, SR., an individual doing business under the firm name and style of Ahearn Electric Company and THE AETNA CASUALTY AND SURETY COMPANY, a corporation,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S PETITION FOR REHEARING

EVANS, MCLAREN, LANE,
POWELL & BEEKS
W. BYRON LANE
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CERTIFICATE

STATE OF WASHINGTON
COUNTY OF KING } ss

MARTIN P. DETELS, JR., being first duly sworn upon oath, deposes and says that he is one of the attorneys for the appellant; that the within petition for rehearing is, in his judgment, well founded and is not interposed for delay.

s/ Martin P. Detels, Jr.

SUBSCRIBED AND SWORN to before me this 22 day of November, 1955.

s/ Gordon W. Mass

Notary Public in and for the State of Washington, residing at Seattle.

PETITION FOR REHEARING

The appellant herein, plaintiff in the court below, herewith petitions this Honorable Court for a rehearing upon this appeal and assigns the following reasons in support of this petition:

1. The court failed and refused to apply the substantive law of contracts of the State of Washington applicable to the case.

2. In its opinion the court misinterpreted the trial court's findings of fact and the evidence in the case.

ARGUMENT ON REASON NO. 1

This court's opinion appears to rest upon the basis that there was a binding contract between the appellant, Westinghouse Electric Supply Company, and the individual appellee, John V. Ahearn, Sr., for the delivery of paper-wrapped telephone cable in August 1952, and that the delivery of latex telephone cable by the plaintiff was tendered in performance of that contract. Appellant disputes that there is any support in the findings of the trial court or in the record for this position. Under this heading, however, appellant urges that the decision of the court was erroneous and must be reversed as contrary to the law of the State of Washington which controls, even under the facts recited in the court's opinion.

In a Miller Act suit, federal courts are bound to

apply the substantive law of contracts of the State of Washington in which the relevant transactions occurred. *Continental Casualty Co. v. Schaeffer,* 173 F. (2d) 5 (Ninth Cir., 1949) (Appellant's Brief, page 20)

This court's opinion appears to hold that where two parties contract for the sale and delivery of specific goods at an agreed price and the seller delivers different goods at a higher price the buyer can take and retain the goods delivered, with knowledge of the higher price demanded by the seller, and pay only the lower price. The law of Washington is to the contrary and requires that appellant's petition for rehearing be granted and the decision of this court reversed.

In *Mutual Sales Agency v. Hori,* 145 Wash. 236, 259 Pac. 712 (1927) (Appellant's Brief, pages 21-23, 30-31, 43), the Supreme Court of Washington had before it a controversy indistinguishable in any material respect from the instant case as viewed by this court.

The material facts in that case were as follows:

1. On March 31, the buyer, Mutual Sales Agency, Inc., wired the seller, M. M. Hori, requesting a quotation on "certified and uncertified gems (potatoes) two to ten ounce."

2. On the same day the seller replied: "Uncertified gems two to eight ounce, our best price three seventy for car."

3. On April 1, seller sent buyer a second quotation as follows: "Netty gem immature seed, price two eighty f.o.b. car, size one to eight ounce field run . . ."

4. On the same day, April 1, buyer wired seller as follows: "Ship immediately . . . the car seed offered your wire date."

5. On April 1, seller wired: "Wire received. Ship you Saturday twenty ton car per instructions."

6. Seller shipped potatoes of the grade specified in its March 31 wire (2 above) and forwarded the bill of lading with a sight draft for the purchase price attached to a bank in the buyer's city.

7. When the shipment arrived buyer wired seller that the potatoes were satisfactory but the price was in error and referred to the seller's wire of April 1 (3 above).

8. Seller replied referring to its wire of March 31 (2 above) and buyer's wire of April 1 (4 above) claiming the latter was acceptance of the former, and insisting car contained more expensive grade of potatoes.

9. Buyer did not answer the last wire but paid the draft, took delivery of the potatoes and disposed of them.

10. Buyer then commenced action to recover the difference between the prices of the two grades of potatoes and garnished the money it had paid to the bank in order to procure the delivery of the potatoes.

In that case the lower court rendered a judgment in favor of the buyer. The Supreme Court of Washington reversed the judgment with directions to enter judgment in the seller's favor.

The Washington Supreme Court assumed that

there was a binding contract for the sale of the lower grade potatoes at the lesser price and that buyer might have maintained an action for breach of the contract to deliver the lower grade of potatoes. It rejected the buyer's argument that having resold the potatoes prior to their delivery it was compelled to accept them to make good its commitment to its vendee.

This case is indistinguishable. Here the seller delivered the more expensive goods and the buyer accepted and used the goods with knowledge of the higher price demanded. The buyer resists recovery of the balance on the purchase price and this court permits it to do so on the ground that Westinghouse breached a contract for delivery of the less expensive paper-wrapped cable. The *Mutual Sales* case, which is controlling in this court, holds that the buyer cannot receive and retain higher priced goods with full knowledge of their price and pay only the agreed price for a lower grade of goods, but that in such case the buyer's remedy is an action for damages for breach of the claimed contract.

The *Mutual Sales* case, referred to three times in appellant's brief and relied upon in oral argument before this court represents the law of Washington, has not been overruled, was not referred to by this court in its opinion, and requires reconsideration of the court's decision.

ARGUMENT ON REASON NO. 2

Appellant respectfully submits that the court's opinion contains assertions of fact not supported by the trial judge's findings or the evidence in the case in the following respects:

1."Ahearn applied to Westinghouse for prices of suitable material under the specification to be used in his own bid." (Opinion, page 2) " . . . (Westinghouse) accepted responsibility for choosing the materials and prices upon which Ahearn based his bid, . . . " (Opinion, page 3).

The only finding of fact bearing on the preparation of the quotation is finding No. VI, which is silent as to whether Westinghouse or Ahearn selected the materials on which the quotation, Exhibit No. 3, was based. The only testimony on the point is that of Mr. Rockwell, Ahearn's foreman at the time, who was the person who requested the quotation. He did not request a quotation on latex-covered cable. The matter was discussed between Rockwell and Ahearn. (Rockwell, Tr. 131-133). There is no contrary testimony.

2. " . . . in accordance with the previous dealings Westinghouse accepted the order . . . (for paper-covered cable) . . . but eliminating the time limitation . . . " (Opinion, page 3). "The trial court found on conflicting evidence that there was an express

contract between the parties that Westinghouse should furnish paper-covered cable before the end of the month of August, 1952, at about $1800.00." (Opinion, page 2).

The trial court found that Exhibit 4, Ahearn's order for paper-wrapped cable, was accepted by Westinghouse (Finding of Fact No. VI, Tr. 18). It did not find that the delivery date had been changed from the third quarter of 1953, as specified in the quotation, Exhibit No. 3, to August 1952. The order referred to, Exhibit No. 4, was not signed by Westinghouse. Exhibit No. 5, a rewrite of Exhibit No. 4 on Westinghouse's form, a copy of which was mailed to Ahearn, (Upson, Tr, 37) specified that the order was "subject to acceptance at the Company's home office."

The only evidence in this record to which the trial court's finding of acceptance by Westinghouse could refer would be the Westinghouse letter to Ahearn, dated February 19, 1952, Exhibit No. 6, which read in pertinent part as follows:

"Gentlemen:

The following items show approximate delivery on material ordered for major repairs to Electric Distribution System, Quarters Area, Puget Sound Naval Shipyard on C-2 priority:

. . .

Western Electric Telephone Wire 6 pr., & 51 pr. paper and sheath—3Q53.

U. S. Rubber Latex Telephone Wire 6 pr., 26 pr. and

51 pr.—3052. U. S. Rubber take exception to sub paragraph "B" under Paragraph 5-09 in that the Mutual capacitance of their wire is .115 MFD instead of .090 as specified."

It should be recalled that Ahearn forwarded this letter to the Navy by a letter, also dated February 19, 1952, (Exhibit 8), and that the Navy replied to Ahearn under date of March 7, 1952, Exhibit 9, authorizing installation of latex cable of the specified characteristics. (It should here be noted that the court's statement at page 3 of the opinion that Ahearn's contract with the Government contained "an express designation of paper-covered cable" is in error. The contract is in evidence as Exhibit No. 18, and it merely incorporates the provisions of the specification, Exhibit No. A-3, paragraph 5.09 of which authorized the installation of either paper-wrapped or latex cable. The exchange of correspondence between Ahearn and the Government, in Exhibits 8 and 9, merely amended the required "mutual capacitance" set forth in the specification and contract.)

The findings as a whole make it clear that the trial court did not accept Ahearn's testimony that he was assured by Westinghouse's salesman, Upson, that the paper-wrapped cable could be delivered in August 1952. The court said (Finding of Fact No. XI, Tr. 20):

". . . Someone among the witnesses is obviously

and knowingly not telling the truth, and I do not know who it is . . .

" . . .

"Both (Mr. Upson and Mr. Ahearn) are interested witnesses. One or the other of them is bound to be telling a falsehood and knows it. I cannot tell which one it is.

" . . .

" . . . This court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff's burden of proof in support of the cause of action alleged in plaintiff's complaint."

It is submitted that the trial court's findings make it clear that it did not find affirmatively for the defendant that there was a conract for August 1952 delivery of paper-wrapped cable. No such issue was tendered by the pleadings, and no such issue was before it.

The trial court did find, and it is not disputed on this appeal, that plaintiff failed to sustain its burden of proof that there was an express contract for the delivery of latex cable.

3. "When the latex-covered cable was shipped, there was performance of the terms of the express contract." (Opinion, page 3). "If the cable had been diamond-studded when tendered in performance of the accepted order, Ahearn could have kept it . . . " (Opinion, page 4).

In these statements and others, the court's opinion implies that Westinghouse tendered the latex

cable in performance of a contract for paper-wrapped cable. Aside from the incredibility inherent in the proposition that material of a reasonable value of $7,646.29 would be delivered in performance of a contract calling for the payment of the sum of $5,469.51 less, the record is replete with testimony that the latex cable was tendered by Westinghouse in performance of what it understood to be an express contract for latex cable, and entirely devoid of any evidence that it was tendered in performance of a contract for paper-wrapped cable.

Westinghouse invoiced Ahearn for the latex cable on December 30, 1952, Exhibit 16. It was received by Ahearn "about the next day.' (Ahearn, Tr. 161). Ahearn himself did not claim that the latex cable was tendered by Westinghouse in performance of a contract for paper cable. His testimony was that Westinghouse's representatives contended he had ordered it. (Ahearn, Tr. 165) The wire was not installed until sometime after January 26, 1953 (Rockwell, Tr. 143-145). There is no contrary testimony.

CONCLUSION

It is respectfully submitted that appellant's petition for rehearing should be granted, for the reasons above stated, in that the court failed and refused to apply the substantive law of contracts of the State of Washington, as relied upon by the ap-

pellant, and for the further reason that the court's opinion reveals that it misinterpreted the record in the foregoing substantial and material respects.

Respectfully submitted,

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